Summaries of Published Opinions

June 3, 2019

2019 CO 44. No. 15SC1095. McCoy v. People. *Sufficiency of the Evidence—Standard of Review—Statutory Construction—Unlawful Sexual Contact.*

This case principally required the Supreme Court to determine the appropriate standard of review for unpreserved claims of insufficient evidence and to apply that standard to decide whether legally sufficient evidence supported defendant's convictions here.

The Court initially concluded that sufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review. Accordingly, appellate courts should review unpreserved insufficiency claims de novo (i.e., in the same manner as if the claims were preserved), and not under a plain error standard of review. Such a rule is consistent with Colorado's criminal procedure rules, long-standing precedent, and the nature of sufficiency claims, including the settled principle that a conviction that is based on legally insufficient evidence cannot stand.

On the merits of defendant's sufficiency claims, the Court began by construing CRS § 18-3-404(1)(g), which bars sexual contact committed during treatment or examination for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices. After determining that this provision is ambiguous, the Court employed settled tools of statutory construction and concluded that the provision applies to a doctor or other individual who is, or holds himself or herself out to be, a health treatment provider of any kind, and who knowingly subjects the victim to sexual contact while examining, treating, or purporting to examine or treat the victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices.

Finally, applying this construction here, the Court concluded that the provision is neither facially overbroad nor unconstitutionally vague and that the prosecution presented sufficient evidence to support defendant's convictions.

Accordingly, the Court affirmed the division's judgment, although its reasoning differs in some respects from that of the division majority.

2019 CO 45. No. 15SC180. Maestas v. People. *Sufficiency of the Evidence—Standard of Review—Statutory Construction.*

The Supreme Court granted certiorari to review the Court of Appeals division's opinion affirming defendant's conviction for second degree burglary.

For the reasons discussed in *McCoy v. People*, 2019 CO 44, __ P.3d __, announced the same day, the Court concluded that sufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review. Accordingly, appellate courts should review sufficiency claims de novo (i.e., in the same manner as if the claims were preserved), and not under a plain error standard of review, including when the claims involve preliminary questions of statutory construction. Because the division reviewed defendant's sufficiency claim for plain error and affirmed the trial court's ruling without considering the merits of defendant's assertion that insufficient evidence supported his conviction for second degree burglary, the Court reversed the portion of the judgment concerning that count and remanded this case with instructions that the division perform a de novo review of defendant's sufficiency claim.

2019 CO 46. No. 18SA266. Klun v. Klun. *Contracts—Settlement Agreement—Fee-Shifting.*

The Supreme Court was asked to decide whether defendant is entitled to recover his attorney fees pursuant to a fee-shifting provision of a prior settlement agreement between him and plaintiffs.

The fee-shifting clause at issue provided that the prevailing party in an action to enforce, by any means, any of the terms of the settlement agreement shall be awarded all costs of the action, including reasonable attorney fees. Here, plaintiffs' claims, in substance, sought relief based on allegations that defendant had breached the terms of the settlement agreement, and defendant responded by arguing that it was plaintiffs' claims that were inconsistent with that agreement. In these circumstances, the Court concluded that plaintiffs' claims constituted an effort to enforce the terms of the settlement agreement. Indeed, consistent with this conclusion, plaintiffs themselves had asserted a claim for fees pursuant to the fee-shifting clause at issue.

Accordingly, the Court held that defendant, as the prevailing party on all claims, is entitled to recover his attorney fees pursuant to the settlement agreement's fee-shifting clause. The Court therefore reversed the water court's order denying an award of such fees and remanded the case for a determination of the trial and appellate fees to be awarded to defendant.

2019 CO 47. No. 17SC200. Colorado Department of Labor and Employment v. Dami Hospitality, LLC. *Eighth Amendment—Corpora-*

tions—Excessive Fines—Workers' Compensation Noncompliance.

The Supreme Court considered whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations. Concluding that this Eighth Amendment protection applies to corporations, the Court held that the proper test to assess the constitutionality of government-imposed fines requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed, as articulated in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The Court of Appeals' ruling was thus reversed and the case was remanded to that Court for return to the Division of Workers' Compensation to determine whether the per diem fines at issue are proportional to the harm or risk of harm caused by each day of the employer's failure to comply with the statutory requirement to carry workers' compensation insurance.

June 10, 2019

2019 CO 48. No. 15SC935. People v. Morehead. *Searches, Seizures, and Arrests—Law of the Case—Mandate and Proceedings in Lower Court.*

The People petitioned for review of the Court of Appeals' judgment reversing Morehead's convictions for possession and possession with intent to distribute a controlled substance, as well as seven gambling-related charges. The Court of Appeals held that the search of defendant's residence violated the Fourth Amendment. It ordered all the evidence seized from defendant's residence suppressed and reversed defendant's convictions. In addition, it mandated that the trial court be barred from considering new arguments for admission of that evidence on retrial.

The Supreme Court held that because the scope and conduct of the suppression hearing are within the sound discretion of the trial court, a trial court on retrial may, except where bound by the ruling of a higher court, determine the appropriateness of entertaining new and different motions, evidence, arguments, or theories for or against suppression of contested evidence.

Because the Court of Appeals erred in restricting the trial court's discretion to entertain additional evidence or consider additional arguments concerning the seizure of this evidence on retrial, that portion of the Court of Appeals' judgment was reversed.

2019 CO 49. No. 17SC708. Ruybalid v. Board of County Commissioners. *Statutory Interpretation—District Attorney—Attorney Fees.*

Ruybalid committed numerous ethical violations arising out of cases that he either prosecuted or supervised while he was district attorney for the Third Judicial District. He argued that he is entitled to the attorney fees and costs he incurred while defending these allegations.

The Supreme Court concluded that because Ruybalid's ethical violations were at times committed recklessly or knowingly, his attorney fees and costs were not necessarily incurred in the discharge of his official duties. Therefore, Ruybalid is not entitled to reimbursement for the attorney fees and costs that he incurred in defending the alleged ethical violations.

The Court of Appeals' judgment was affirmed on different grounds.

2019 CO 50. No. 18SA237. People v. Brown. *Reverse Transfer—Waiver—Self-Incrimination.*

The Supreme Court exercised its original jurisdiction under C.A.R. 21 to review the trial court's order denying a request for a protective order during a reverse-transfer hearing.

The Supreme Court concluded that neither the reverse-transfer statute, CRS § 19-2- 517(3), nor common law principles regarding the scope of waiver provides a defendant with the ability to temporarily waive privilege as to information disclosed during a reverse-transfer hearing. The Court also concluded that this result does

not impermissibly burden a defendant's Fifth Amendment right against self-incrimination.

Thus, the Court held that if a defendant discloses privileged information in open court during a reverse-transfer hearing, that defendant would waive privilege as to any such information at trial.

The trial court's order was affirmed and the rule to show cause was discharged.

2019 CO 51. No. 18SC30. Carousel Farms Metropolitan District v. Woodcrest Homes, Inc. *Takings—Public Purpose—Economic Development.*

The Supreme Court considered the appropriate standard of review for condemnation cases and whether a condemnation by a special metropolitan district that satisfies private, contractual obligations while also providing benefits to the public violates the Colorado Constitution and relevant statutes.

The Court held that takings questions present mixed issues of law and fact, with public use being a question of law that is reviewed de novo. As a result, the Court reviewed de novo the taking in question. The Court held that takings that essentially benefit the public will survive constitutional scrutiny, even if, at the time of the taking, there is an incidental private benefit. Therefore, the taking here is valid, as the condemned land will be used for various utilities and public rights of way.

The Court further held that the plain language of CRS § 38-1-101(1)(b)(I) only limits the transfer of condemned land to a private entity. Because there is no transfer to a private entity here, that section is inapplicable.

The Court of Appeals' judgment was reversed and the case was remanded for further proceedings consistent with this opinion.

June 17, 2019

2019 CO 52. No. 19SA13. People v. Haack. *Search and Seizure—Exclusionary Rule—Independent Source.*

The People brought an interlocutory appeal, as authorized by CRS § 16-12-102(2) and C.A.R. 4.1, from a district court order partially granting Haack's motion and suppressing evidence acquired after officers made a warrantless entry into his residence. The district court found that the officers had unlawfully followed defendant into his home and, as a result, all relevant evidence they acquired either inside the home or after defendant and officers went back outside should be suppressed. The court did not, however, offer any rationale for suppressing the evidence acquired after leaving defendant's residence beyond the fact that the acquisition followed in time the unlawful entry.

The Supreme Court held that because the district court failed to address whether the evidence it suppressed was independent of the earlier unlawful entry, the portion of its order suppressing this evidence was not adequately supported by its findings and was therefore vacated. The case was remanded with directions to determine whether the evidence acquired after leaving defendant's home was in fact derivative of the unlawful entry at all and, if so, whether the subsequent searches in which that evidence was discovered were genuinely independent sources of that evidence.

2019 CO 53. No. 17SC66. People in the Interest of T.B. *Juvenile Delinquency—Sexual Exploitation of a Child Statute—Erotic Nudity.*

In this case, the Supreme Court was asked to determine whether a juvenile can be adjudicated delinquent under the sexual exploitation statute, CRS § 18-6-403(3), for possessing sexually explicit nude photos of two underage girls. A person commits sexual exploitation of a child under the statute, if, as relevant here, he or she knowingly "possesses or controls any sexually exploitative material for any purpose." CRS § 18-6-403(3)(b.5). "Sexually exploitative material" includes any photograph that depicts a child engaged in "explicit sexual conduct," which includes "erotic nudity." CRS § 18-6-403(2)(e) to (j). The statute defines "erotic nudity" as "the display" of certain intimate body parts "for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved." CRS § 18-6-403(2)(d).

The Court held that CRS § 18-6-403(3) need not be read to limit sexually exploitative material to images that depict "an act or acts of sexual abuse" of a child. Such a limitation is neither warranted by the plain language of the statute nor required to avoid First Amendment concerns. The Court additionally held that the statute contained no exception for juvenile sexting behavior at the time of the conduct at issue. The Court further held that the sexually explicit content of the nude photos and the circumstances surrounding their creation here, including the juvenile's repeated requests for them, demonstrate they were made for his "overt sexual gratification." Thus, the trial court properly deemed the photos erotic nudity for purposes of the sexual exploitation statute.

Accordingly, the Court affirmed the Court of Appeals' judgment upholding the juvenile's adjudication.

2019 CO 54. No. 18SA221. In re People in the Interest of T.T. *Mental Health—Court Records—Public Access.*

In this original proceeding under C.A.R. 21, the Supreme Court reviewed whether Eclipse, the user interface of the judicial branch's computerized case management system, is an "index of cases" as contemplated by CRS § 27-65-107(7) (requiring clerk to omit names of persons released from involuntary short-term mental health treatment from the court's "index of cases"). In *People in the Interest of T.T.*, 2017 COA 132, 410 P.3d 792, the Court of Appeals held that Eclipse is an "index of cases" for purposes of CRS § 27-65-107(7) and directed the district court to order that plaintiff's name be omitted from the Eclipse system and any lists generated from the system's data. Plaintiff sought C.A.R. 21 relief asking the Supreme Court to direct the district court to comply with the Court of Appeals' mandate.

The Supreme Court issued a rule to show cause but declined to grant plaintiff's requested relief. Plaintiff's mental health case remains sealed and is not accessible to the public. The Court held that neither the Eclipse user interface, nor its underlying database, ICON, functions as an "index of cases" for purposes of CRS § 27-65-107(7). Moreover, to remove an individual's name from this case management system would thwart the court's statutory obligations to link the record of a short-term mental health case with subsequent cases involving that individual and to share certain information with

the federal government. Because the district court's compliance with the Court of Appeals' mandate is neither warranted nor feasible, the Supreme Court discharged the rule to show cause and disapproved of the Court of Appeals' opinion in T.T.

2019 CO 55. No. 15SC877. Kutzly v. People. *Expert Testimony—Reliability—*Shreck *Hearing.*

Prior to his trial for several crimes involving sexual assault on a child, Kutzly filed a motion requesting a *Shreck* hearing to determine the reliability of one of the prosecution's proposed expert witnesses. The trial court denied the motion. Kutzly argued that the trial court erred in denying his motion because it failed to make a specific finding regarding the reliability of the proposed expert testimony.

The Supreme Court concluded that the trial court made specific findings of reliability such that its decision not to hold a *Shreck* hearing was not an abuse of discretion. Hence, the trial court did not abuse its discretion in concluding that the expert's testimony was reliable.

Accordingly, the Court of Appeals' decision was affirmed.

2019 CO 56. No. 19SA22. In re N.A. Rugby Union v. U.S. Rugby Football Union. *Nonsignatory to an Arbitration Agreement—Principal and Agent—Estoppel—Third-Party Beneficiary.*

In this original proceeding pursuant to C.A.R. 21, the Supreme Court was asked to decide whether the district court erred when it ordered petitioner, a nonsignatory to an agreement, to arbitrate claims brought against it by respondents pursuant to an arbitration provision in the agreement that covered the parties (including respondents) and their agents. The district court found that because the nonsignatory was an agent for a signatory of the agreement, the nonsignatory fell "squarely within the broad language of the arbitration provision" and thus it was required to arbitrate.

The Court issued a rule to show cause. Although the Court has not yet opined on the issue, the weight of authority nationally establishes that, subject to a number of recognized exceptions, only parties to an agreement containing an arbitration provision can compel or be subject to arbitration. The Court adopted the general rule and its exceptions and concluded that, because the nonsignatory was never a party to the agreement at issue and because respondents have not established that any of the recognized exceptions apply, the district court erred in determining that the nonsignatory is subject to arbitration under the agreement.

The Court therefore made the rule to show cause absolute.

2019 CO 57. No. 19SA25. In re Ballot Title #3. *Title Setting—Single Subject Requirement—Ballot Initiatives.*

This appeal required the Supreme Court to decide whether the Title Board erred in declining to set a title for proposed Initiative 2019–2020 #3. The proposed initiative reads, in full, "Be it Enacted by the People of the State of Colorado: Section 1. In the constitution of the state of Colorado, repeal section 20 of article X." The Title Board declined to set a title for this initiative because it concluded that the initiative did not constitute a single subject as required by the Colorado Constitution.

Applying settled principles for determining whether a proposed initiative constitutes a single subject, the Court reversed the Title Board. The Court concluded that the initiative, which would ask voters the single question of whether the Tax Payer's Bill of Rights should be repealed, constitutes a single subject. To the extent that prior Supreme Court decisions have said that if a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects, the Court concluded that those decisions are not binding under principles of stare decisis and are not analytically sound, and it disapproves them.

The Court therefore returned the initiative to the Title Board for the purpose of setting a title, ballot title, and submission clause.

2019 CO 58. No. 17SC427. Blooming Terrace No. 1, LLC v. KH Blake Street, LLC. *Statutory Interpretation—Usury.*

In this case, the Supreme Court interpreted the Colorado usury statute to clarify the proper method for determining the effective rate of interest charged on a non-consumer loan. The Court held that the effective interest rate should be calculated by determining the total per annum rate of interest that a borrower is subjected to during a given extension of credit. Here, where a forbearance agreement was entered into after an event of default, all charges that accrued during the period of forbearance must be totaled and then annualized using only that timeframe as the annualization period. Such includable interest must then be combined with any interest that continued to accrue pursuant to the original loan terms to determine the effective rate of interest subject to the 45% ceiling set by CRS § 5-12-103.

2019 CO 59. No. 17SC61. People v. Chavez-Torres. *Postconviction Relief—Justifiable Excuse or Excusable Neglect—Entitlement to a Hearing—Advice by Plea Counsel Regarding the Immigration Consequences of a Guilty Plea.*

The Supreme Court agreed to review this case to determine whether a noncitizen defendant is entitled to a hearing on the timeliness of his Crim. P. 35(c) postconviction motion when he invokes the justifiable excuse or excusable neglect exception to the statutory time bar and alleges that plea counsel provided him no advice regarding the immigration consequences of his plea. It concluded that the answer generally depends on the specific allegations set forth in the motion; however, when the plea agreement or the plea hearing transcript is submitted, the trial court should consider it in conjunction with the allegations advanced.

Here, defendant alleged that he had no reason to question or investigate plea counsel's failure to advise him regarding the immigration consequences of his plea. Further, although he was not required to do so, defendant submitted the plea agreement and the plea hearing transcript with his motion, and neither referenced immigration consequences. Therefore, the Court concluded that the factual allegations in defendant's motion (which must be assumed to be true), when considered in conjunction with the plea agreement and the plea hearing transcript, are sufficient to establish justifiable excuse or excusable neglect for failing to collaterally attack the validity of his felony conviction within the applicable limitations period. Accordingly, defendant is entitled to a hearing.

2019 CO 60. No. 17SC728. People v. Alvarado Hinojos. *Postconviction Relief—Justifiable Excuse or Excusable Neglect—Entitlement to a Hearing—Advice by Plea Counsel Regarding the Immigration Consequences of a Guilty Plea.*

The Supreme Court agreed to review this case to determine whether a noncitizen defendant is entitled to a hearing on the timeliness of his Crim. P. 35(c) postconviction motion when he invokes the justifiable excuse or excusable neglect exception to the statutory time bar and alleges that plea counsel provided him erroneous advice regarding the immigration consequences of his plea. It concluded that the answer generally depends on the specific allegations set forth in the motion; however, when the plea agreement or the plea hearing transcript is submitted, the trial court should consider it in conjunction with the allegations advanced.

Because the factual allegations in defendant's motion (which must be assumed to be true), when considered in conjunction with the plea agreement, are insufficient to establish justifiable excuse or excusable neglect for failing to collaterally attack the validity of his misdemeanor conviction within the applicable limitations period, the Court ruled that he is not entitled to a hearing. The immigration advisement contained in the plea agreement, at a minimum, gave the defendant reason to question the accuracy of his plea counsel's advice regarding the immigration consequences of his plea. Thus, even taking at face value the allegations in the motion, defendant was on notice at the time of his plea that he needed to diligently investigate his plea counsel's advice and, if appropriate, file a timely motion challenging the validity of his conviction.

June 24, 2019

2019 CO 61. No. 18SA189. Jones v. Williams. *Habeas Corpus—Statutory Interpretation—Jurisdiction.*

In this habeas corpus appeal, the Supreme Court considered whether a district court may summarily dismiss a petition for lack of jurisdiction because the petitioner failed to include a warrant of commitment, as required by CRS § 13-45-101(1). The Court held that noncompliance with the warrant requirement does not deprive courts of jurisdiction over habeas corpus petitions. When the petitioner does not supply all the relevant warrants of commitment and the court believes that all the warrants are necessary for fair resolution of the

habeas petition, the court should either ask the petitioner to provide the missing information or consider the petition based on the information provided.

To the extent that *Butler v. Zavaras*, 924 P.2d 1060, 1062 (Colo. 1996), *Evans v. District Court*, 572 P.2d 811, 813 (Colo. 1977), *Garrett v. Knight*, 480 P.2d 569, 570–71 (Colo. 1971), and *McNamara v. People*, 410 P.2d 517, 517–18 (Colo. 1966) hold that noncompliance with the warrant requirement is jurisdictional, deprives the court of authority to act, and requires summary dismissal, the Supreme Court overruled these cases.

2019 CO 62. No. 18SA284. In re Estate of Feldman. *Slayer Statute—Preliminary Injunctive Relief.*

Feldman and the law firm Haddon, Morgan & Foreman petitioned for relief pursuant to C.A.R. 21 from a probate court order requiring the law firm to provide information to the special administrator concerning its representation of Feldman in a criminal prosecution for the murder of his wife, and to deposit funds held in its client trust account into the court registry. In response to the special administrator's assertion that Colorado's "slayer statute" applies to the funds at issue as proceeds of the decedent's life insurance policy, the probate court determined that if Feldman were later found, in the manner prescribed by the statute, to be the decedent's killer, he would be ineligible to receive those proceeds. Against that eventuality, the probate court found that compelling the return of the unearned funds in the firm's client trust account would be the only way to protect the children's interests, and the court's equitable powers permitted it to do so.

The Supreme Court issued a rule to show cause and concluded that the probate court abused its discretion by issuing its order without weighing the considerations inherent in preliminarily enjoining the law firm from expending further funds in the representation of Feldman. In addition, however, because the slayer statute expressly protects third parties who receive a payment in satisfaction of a legally enforceable obligation from being forced to return that payment or from liability for the amount of the payment, the Court determined that no finding of a reasonable likelihood of success in attempting to force the return of the insurance proceeds would have been possible. Given this resolution, the Court further concluded that the disclosures ordered by the probate court would not serve their intended purpose.

The Court therefore made the rule to show cause absolute.

2019 CO 63. No. 19SA30. People v. Brown. *Search and Seizure—Reasonable Suspicion—Investigatory Stop.*

In this original proceeding pursuant to C.A.R. 4.1 and CRS § 16-12-102(2), the Supreme Court reviewed the district court's order suppressing evidence arising out of an investigatory stop that led to drug charges being brought against defendant.

The Court considered whether, under the totality of the circumstances, the police officer had reasonable suspicion to stop defendant to determine his identity. Because the officer received a report of a domestic disturbance, saw defendant walking away from the location of the reported disturbance immediately thereafter, and saw no one else in the area, the Court held that the officer had reasonable suspicion to stop defendant to determine his identity. The Court therefore reversed the district court's suppression order and remanded the case for further proceedings consistent with this opinion.

2019 CO 64. No. 17SC147. Garcia v. People. *Plain Error—Statutory Interpretation—Sentence Enhancers.*

In this case, the Supreme Court considered an alleged instructional error where the jury instruction at issue tracked the language of the model jury instruction that existed at the time of trial. The Court held that simply following model jury instructions doesn't avoid plain error. However, the Court concluded that any error regarding the instruction at issue here doesn't require reversal because defendant failed to show that any error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of defendant's convictions.

The Court also held that the force sentence enhancer in CRS § 18-3-402(4)(a), which elevates sexual assault from a class 4 felony to a class 3 felony, doesn't require proof of a mens rea.

2019 CO 65. No. 17SC583. Owners Insurance Co. v. Dakota Station II Condominium Ass'n, Inc. *Insurance Appraisal—Contract Interpretation.*

In this case, the Supreme Court interpreted language in the appraisal provision of an insurance policy requiring each party to "select a[n] . . . impartial appraiser." It concluded, based on the plain meaning of the word "impartial," that the policy requires the appraisers to be unbiased, disinterested, and unswayed by personal interest. The appraisers must not favor one side more than another, so they may not advocate for either party.

The Court also considered whether a contingent-cap fee agreement between a party and an appraiser rendered the appraiser partial as a matter of law. The Court held that the agreement in this case did not.

2019 CO 66. No. 16SC267. Campbell v. People. *Expert Testimony—Harmless Error.*

This case required the Supreme Court to decide whether the trial court abused its discretion in permitting a police officer to testify regarding the results of a Horizontal Gaze Nystagmus (HGN) test without first qualifying that officer as an expert witness under CRE 702 and *Venalonzo v. People*, 2017 CO 9, 388 P.3d 868. The Court concluded that, on the facts of this case, the officer's testimony concerning the HGN test was expert testimony under CRE 702 and the district court therefore erred in holding otherwise. The Court further concluded, however, that on the facts presented here, the trial court's error in admitting the testimony was harmless. Accordingly, the Court affirmed the district court's judgment.

2019 CO 67. No. 18SA212. Santich v. VCG Holding Corp. *Contract Enforcement—Arbitration—Equitable Estoppel.*

The Supreme Court accepted jurisdiction over a certified question of law from the U.S. District Court for the District of Colorado to determine whether there should be an arbitration-specific exception to Colorado's traditionally defined doctrine of equitable estoppel. The Court held that Colorado's law of equitable estoppel applies in the same manner when a dispute involves an arbitration agreement as it does in other contexts. The Court recognized that under Colorado law, equitable estoppel requires proof of four elements—one of which is detrimental reliance. Thus, a nonsignatory to an arbitration agreement can only assert equitable estoppel against a signatory in an effort to compel arbitration if the nonsignatory can demonstrate each of the elements of equitable estoppel, including detrimental reliance. CL

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